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No. 04-439

In the Supreme Court of the United States

HOWARD WAYNE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel by his counsel's alleged failure to locate certain witnesses and engage in additional pre-trial witness preparation.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2004. The petition for a writ of certiorari was filed on September 27, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was

sentenced to 120 months of imprisonment, to be followed by three years of supervised release. On direct appeal, the conviction and sentence were affirmed. 34 Fed. Appx. 962 (5th Cir. 2002) (Table). Thereafter, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, alleging ineffective assistance of counsel. The district court denied the motion (Pet. App. 3a-4a), and the court of appeals denied petitioner's motion for a certificate of appealability. *Id.* at 1a-2a.

1. On August 19, 1999, Tarrant County Sheriff's Department deputies executed a search warrant for petitioner at Predator Car Audio, an automobile audio business owned by a woman who petitioner subsequently married. At the scene, Deputy Kendall Novak handcuffed petitioner, frisked him for weapons, and found a Firestar .40-caliber handgun in a holster attached to petitioner's front waistband. The agents also seized drugs, cash, and other firearms from the premises. A few days later, while in custody, petitioner admitted that he had purchased the firearm at a gun show. Gov't C.A. Br. 3-6 & n.4.

At trial, Dubresse Cookston and Steve Wazny, both of whom were in the audio store during the execution of the warrant, testified for petitioner. Cookston, an employee of Predator Car Audio, testified that the Firestar handgun was his and that he had purchased the handgun for $350 from a man named Warren Walston in February 1999—a claim supported by a bill of sale and warranty papers introduced at trial. Cookston also testified that he kept the firearm in the back of his Ford Explorer when the shop was open, and that he had, in fact, placed the gun in the car's back side-pocket on the day of petitioner's arrest. Cookston maintained that petitioner was next to him when the police entered the business, and he did not see the gun

in petitioner's waistband. In addition, Cookston did not see the deputies remove the gun from petitioner. Rather, according to Cookston, a deputy looked into the back of his Ford Explorer and emerged from behind the car with the gun in his hands. Finally, Cookston testified that the firearm was far too heavy to have been worn on petitioner's elastic waistband. Gov't C.A. Br. 7-8.

Steve Wazny, a self-employed speaker-box builder, testified that he and other individuals were installing boxes in a customer's vehicle when the deputies arrived. Wazny claimed that he had never seen petitioner carry a gun, that he did not see any officer remove a firearm from petitioner, and that the seized handgun was usually stored in the back of Cookston's Ford Explorer. Gov't C.A. Br. 8.

On September 18, 2000, the jury returned a guilty verdict, and the district court sentenced petitioner to the statutory maximum of 120 months of imprisonment. Pet. App. 1a.

2. After his conviction was affirmed on direct appeal, petitioner filed a motion to vacate his sentence under Section 2255, arguing that his trial counsel, Warren St. John, was ineffective. Specifically, petitioner claimed that St. John had failed to interview key witnesses and had spent an inadequate amount of time preparing defense witnesses.

To support his claim, petitioner called three witnesses—Dustin Arwood, Warren Walston, and Shane Smith—who stated that they would have testified on petitioner's behalf but were never approached by St. John. Arwood testified that he would have corroborated Cookston's testimony about the gun's ownership, because he was present when Walston sold the Firestar handgun to Cookston. 11/6/03 Tr. 11-

12. Walston, moreover, testified that he would have admitted selling the Firestar handgun to Cookston. *Id.* at 16-22. Smith would have testified that he was working at the auto audio store on the day petitioner was arrested and had not seen petitioner with a firearm on the premises. Smith admitted, however, that he had left the premises before the officers arrived and was not present during petitioner's arrest. *Id.* at 56-63.

In addition, Cookston and Wazny testified that they had minimal contact with St. John before trial and that St. John failed to ask them for information about other potential defense witnesses. 11/6/03 Tr. 23-32, 32-40. Petitioner testified that he personally met with St. John three times before his trial. *Id.* at 47-48.

St. John and his legal assistant, Colleen Plowman, testified for the government. 11/6/03 Tr. 63-78, 102-106. St. John stated that he had attempted to locate Smith (to no avail) using information petitioner had provided him. *Id.* at 73-74. St. John eventually hired a private investigator to interview Arwood, Walston, and Smith, but the investigator was unable to locate them. *Id.* at 73-76. With respect to the witnesses he located, St. John testified that he had conducted a formal two-hour interview of Cookston and Wazny at his office, in addition to meeting with Cookston on two other occasions, talking with Wazny by telephone on one occasion, and talking repeatedly to petitioner and his wife. *Ibid.*

3. The district court denied petitioner's motion on the ground that "St. John did what a reasonable lawyer would be expected to do to locate the witnesses." 11/6/03 Tr. 107-108; Pet. App. 3a, 4a. In addition, any failure to investigate was not prejudicial, the court observed, because "even if additional witnesses had been produced, they wouldn't have added anything to

the testimony that was received at trial and they wouldn't have changed the outcome even if they had been brought as witnesses." 11/6/03 Tr. 108. The court stated that the jury had the bill of sale and "heard the testimony of Mr. Cookston relative to the transaction. Obviously, the jury followed the Court's instruction that the issue was possession. It wasn't a matter of who owned the gun. It was who possessed it." *Ibid.* Thus, the court concluded, the verdict would not have changed "if those witnesses had been brought in." *Ibid.*

4. The court of appeals denied petitioner's motion for a certificate of appealability. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 5-24) that his trial counsel failed to investigate the case and prepare defense witnesses, in violation of his right to the effective assistance of counsel under the Sixth Amendment. Because petitioner's ineffectiveness claim lacks merit and petitioner challenges only the facts found by the district court and court of appeals, further review by this Court is not warranted.

1. Under 28 U.S.C. 2253, a court of appeals may not issue a certificate of appealability unless the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Accordingly, petitioner must show that reasonable jurists could debate whether the petition would have been resolved differently or that the issues presented required further action. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003); *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner cannot meet this standard.

a. To demonstrate that St. John rendered ineffective assistance, petitioner must show (i) that his counsel's performance was deficient, and (ii) that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Strickland* v. *Washington*, 466 U.S. 668, 687, 694 (1984). See generally *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003); *Bell* v. *Cone*, 535 U.S. 685, 695 (2002). Where counsel's pre-trial investigation is challenged as deficient, a court must evaluate, with due deference to counsel's actions, whether the level of investigation was reasonable. As this Court has observed in the death penalty context, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Thus, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ibid.*

Under that standard, St. John's assistance was clearly effective. The record amply demonstrates that St. John's investigation and his decision to curtail it were reasonable. Before trial, St. John interviewed petitioner, Cookston, Wazny, and petitioner's wife, and obtained the bill of sale and warranty for the Firestar handgun. St. John asked petitioner for Smith's contact information and attempted to locate Smith personally. He also directed an investigator to locate Arwood, Walston, and Smith, but the investigator was unable to locate them. See 11/6/03 Tr. 73-76. Having interviewed, or attempted to locate and interview, all witnesses brought to his attention, St. John's investigation and his curtailment of the investigation after additional witnesses could not be located was "supported by reasonable professional judgment." *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987).

In addition, the record demonstrates that St. John's pre-trial preparation of Cookston and Wazny was ade-

quate. St. John met with the witnesses in person for over two hours and discussed their testimony via telephone. 11/6/03 Tr. 73-77. In light of the fact that Cookston's and Wazny's testimony was straight-forward and involved only their recollections of petitioner's arrest and the purchase of the Firestar handgun, little additional preparation was necessary.

Petitioner does not challenge the overall standard governing ineffective assistance claims. Nor does he dispute that, as found by the district court and court of appeals, the facts support the conclusion that St. John's assistance was adequate. Rather, petitioner challenges (Pet. 8-17) the facts found by the courts below. Specifically, petitioner disagrees with the district court's crediting of St. John's testimony that he attempted to locate witnesses himself and hired a private investigator to locate potential witnesses. Pet. 8, 14-15. Petitioner also challenges St. John's factual representation of the amount of time he spent preparing Cookston and Wazny. Pet. 17-20. As such, petitioner's claims involve only disputes of fact, not legal questions. This Court does not grant review to revisit factual findings by the courts below in the absence of obvious error, see *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996), of which there is none here.

b. In any event, petitioner's ineffectiveness claim lacks merit because petitioner suffered no prejudice. As the district court observed (11/6/03 Tr. 108), whether Cookston owned the firearm was irrelevant, because the government needed to demonstrate only petitioner's possession of the Firestar under Section 922(g)(1). See, *e.g.*, *United States* v. *Hubbard*, 61 F.3d 1261, 1272 (7th Cir. 1995), cert. denied, 516 U.S. 1175 (1996); *United States* v. *Boykin*, 986 F.2d 270, 274 (8th Cir.) ("ownership is irrelevant to the issue of

possession"), cert. denied, 510 U.S. 888 (1993). Thus, Arwood's and Walston's testimony on that issue was immaterial. Moreover, because the jury already had the gun's bill of sale and heard Cookston's testimony about owning the gun, Arwood's and Walston's testimony would have been cumulative. Smith's testimony, likewise, would have had no value, because he could not have testified about petitioner's possession of the firearm, as Smith admitted that he was not in the auto audio store when the police arrived. Accordingly, Arwood's, Walston's, and Smith's testimony would not have created a reasonable probability of a different outcome.

Finally, petitioner has failed to demonstrate any prejudice from St. John's purported inadequate preparation of Cookston and Wazny. Indeed, the petition fails to argue that Cookston's and Wazny's testimony would have been different had St. John spent additional time with them.

2. This case should not be held pending a decision in *Rompilla* v. *Beard*, cert. granted, No. 04-5462 (Sept. 28, 2004). One of the issues in that case is whether capital defense counsel rendered deficient assistance in failing to obtain all reasonably available records on the defendant's background, when interviews with the defendant, his family members, and three mental health professionals gave counsel no reason to conclude that the records would contain mitigating evidence. There is no likelihood that the resolution of that question would have any relevance for the fact-specific ineffective assistance claim made here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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